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Oil and Gas - Leases: The Supreme Court of North Dakota Holds That a Lessee's Failure to Respond within Twenty Days to a Notice of Termination of a Lease Does Not Result in Automatic Termination of Interest in the Lease

Leah Kelley Kopseng

OIL AND GAS—LEASES: THE SUPREME COURT OF NORTH DAKOTA HOLDS THAT A LESSEE'S FAILURE TO RESPOND WITHIN TWENTY DAYS TO A NOTICE OF TERMINATION OF A LEASE DOES NOT RESULT IN AUTOMATIC TERMINATION OF INTEREST IN THE LEASE

Ridl v. EP Operating Ltd. Partnership
553 N.W.2d 784 (N.D. 1996)

I. FACTS

On March 9, 1969, the Ridls granted an exclusive oil and gas lease on their property in Stark County, North Dakota, to a predecessor of EP Operating Limited Partnership (hereinafter EP).[1] The lease was granted for a primary term of five years.[2] The lease also allowed for the continuation of the lease after the primary term.[3] On March 15, 1973, a portion of the leased land became part of a producing unit called the Dickinson Heath Sand Unit (hereinafter Dickinson Unit).[4] Anton A. Ridl and Eleanor Ridl conferred another oil and gas lease on the same lands on

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1. Ridl v. EP Operating Ltd. Partnership, 553 N.W.2d 784, 785-86 (N.D. 1996). The plaintiffs, Anton J. Ridl, Sadako Ridl, Eugene K. Ridl, Clarence R. Ridl, June Ridl, Grace I. Wetzel, Raymond A. Ridl, and Regina A. Ridl, received their interests from Anton A. Ridl and Eleanor Ridl. *Id.* The 1969 lease was given by Anton A. Ridl, Eleanor M. Ridl, Anton J. Ridl, Sadako Ridl, Raymond A. Ridl, and Regina A. Ridl. *Id.* at 786. The lease at issue is now owned by Enserch Exploration. *Id.* at 785 n.2.

2. *Id.* at 786. The primary term of an oil and gas lease is the time period in which the lessee has the right, but not the obligation, to drill for oil and gas on the leased land. EUGENE O. KUNTZ ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 159 (2d ed. 1993). The property that was leased by the Ridls is located at East 1/2, Southeast 1/4, and Northwest 1/4, Southeast 1/4 of section 23, and Northwest 1/4 and South 1/2 (excluding 77.96 acres) of section 24, Township 140 North, Range 96 West in Stark County. *Ridl*, 553 N.W.2d at 786.

3. *Id.* The granting clause asserted that the lease would be in effect after the initial five year term by the following language:

> 'and as long thereafter as oil or gas or casinghead gas of either or any of them, is produced therefrom; or as much longer thereafter as the lessee in good faith shall conduct drilling operations thereon and should production result from such operations, this lease shall remain in full force and effect as long as oil and gas or casinghead gas, shall be produced therefrom; or as much longer thereafter as the lessee in good faith shall conduct drilling operations thereon and should production result from such operations, this lease shall remain in full force and effect as long as oil or gas or casinghead gas shall be produced therefrom.'

Id. This clause is known as a "thereafter" clause. *See* Feland v. Placid Oil Co., 171 N.W.2d 829, 831 (N.D. 1969). This clause may extend the lease into a secondary term after the primary term has expired. KUNTZ ET AL., *supra* note 2. The secondary term is a period of time in which the lessee is granted rights to develop the leasehold if production of oil and gas is obtained. *Id.*

4. *Ridl*, 553 N.W.2d at 786. The Southeast quarter of section 23 was included in the Dickinson Unit. *Id.*

December 20, 1973.[5] This lease was also granted for a primary term of five years and provided for a secondary term.[6] Unitization was allowed by both the 1969 lease and the 1973 lease, and both leases stated that unitized production would qualify as production under the lease.[7]

In 1976, R. E. Moore wrote to EP on behalf of the Ridls, asking EP to either drill a well on the leased land or release it.[8] EP's reply to Moore's letter was that the lease was held by production due to the Dickinson Unit and, therefore, EP would not release the Ridls' lease.[9] Anton A. Ridl and Eleanor Ridl ratified the 1973 lease on April 15, 1981.[10] EP's predecessor started drilling a well on the leased land on May 12, 1981.[11] On June 2, 1981, EP's predecessor completed the well as a dry hole.[12]

On May 15, 1995, the Ridls' attorney sent a letter to EP requesting that EP release the 1973 lease with the exception of the portion that was included in the Dickinson Unit.[13] The Ridls' attorney included a partial release for EP to sign and a notice of termination.[14] These documents were drawn up pursuant to the requirements set out in Section 47-16-36 of the North Dakota Century Code, which deals with the termination and

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5. *Id.* The land was leased again due to a mistake on the part of EP's predecessor, Lone Star Producing Company [hereinafter Lone Star]. Brief of Appellee at 6, Ridl v. EP Operating Ltd. Partnership, 553 N.W.2d 784 (ND 1996) (Civ. No. 960032). The lease was acquired by Lone Star because the company mistakenly believed that the 1969 lease did not exist. *Id.* Also, Anton J. Ridl and Eleanor Ridl received bonus payments for both of these leases. *Id.* at 8-9. The error was later discovered when the company was examining the Ridls' file due to R. E. Moore's letter. *See infra* notes 8-9 and accompanying text. Anton J. Ridl and Eleanor Ridl were asked to return $11,000, the amount of the overpayment, but they did not do so. Brief of Appellee at 6, *Ridl* (Civ. No. 960032).

6. *Ridl*, 553 N.W.2d at 786. The granting clause stated that the lease could continue beyond the primary term 'as long thereafter as oil, gas, distillate . . . is produced hereunder, or any operation is conducted, any payment is made, or any condition exists, which as hereinafter provided continues this lease in force.' *Id.*

7. *Id.* at 786, 788 n.5. Unitization is defined as "[b]ringing together . . . some of all of the well spacing units over a producing reservoir for joint operations." 2 OWEN L. ANDERSON, NORTH DAKOTA OIL AND GAS LAW AND LAND PRACTICE 473 (The Institute for Energy Development, Inc. 1983).

8. *Ridl*, 553 N.W.2d at 788. R. E. Moore is an "oilman" from Dickinson, North Dakota. Brief of Appellant at 5, Ridl v. EP Operating Ltd. Partnership, 553 N.W.2d 784 (ND 19966) (Civ. No. 960032). He is the president of an oil company and has been in the oil business for many years. Brief of Appellee at 6, *Ridl* (Civ. No. 960032).

9. *Ridl*, 553 N.W.2d at 788. The letter also explained that the error was made in acquiring the 1973 lease. Brief of Appellant at 8, *Ridl* (Civ. No. 960032); Brief of Appellee at 9, 15, *Ridl* (Civ. No. 960032).

10. *Ridl*, 553 N.W.2d at 786.

11. *Id.* The well was drilled on the Southwest 1/4, Northwest 1/4 of section 24. *Id.*

12. *Id.* Other wells were drilled close to the Ridls' land at approximately the same time. Brief of Appellee at 10, *Ridl* (Civ. No. 960032). These wells were also completed as dry holes. *Id.*

13. *Ridl*, 553 N.W.2d at 786. These documents were sent by certified mail. Brief of Appellant at 5, *Ridl* (Civ. No. 960032). They were received and signed for by EP Operating on May 31, 1995. *Id.*

14. *Ridl*, 553 N.W.2d at 786.

forfeiture of leases.[15] The notice of termination stated that the lease was "forfeited and void" if EP did not inform the county's Register of Deeds within twenty days that the "lease ha[d] not been forfeited."[16] The letter from the Ridls' attorney also demanded that EP sign and record a release of the lease.[17] EP received the communication on May 31, 1995.[18] EP's legal department received the mailing on June 15, 1995.[19]

Pursuant to Section 47-16-36, the Ridls recorded a Satisfaction of Oil and Gas Lease with the Register of Deeds twenty days after their attorney sent EP the demand letter, the notice of termination, and the partial release.[20] At the same time, the Ridls also recorded a notice of termination of the 1973 lease, excluding the Dickinson Unit.[21] The next day, EP sent a letter to the Ridls' attorney and the Register of Deeds stating that the lease had not been forfeited and was still "in full force and effect."[22] Additionally, on July 5, 1995, EP recorded a notice of oil and gas lease stating that the lease remained "in full force and effect" and asserting that the lease had been held by continuous production from the Dickinson Unit.[23]

The Ridls then brought an action against EP for cancellation of the 1973 lease on the grounds that EP had not responded in a timely manner to the notice of termination or breach of the implied covenant of reasonable development.[24] EP counterclaimed and both parties filed

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15. Brief of Appellant at 5, *Ridl* (Civ. No. 960032) (citing N.D. CENT. CODE § 47-16-36 (Supp. 1998)).

16. *Ridl*, 553 N.W.2d at 786. (quoting N.D. CENT. CODE § 47-16-36 (Supp. 1997)).

17. *Id.*

18. *Id.* The mailing was delayed because it was sent to Enserch Corporation, the parent company of EP. Brief of Appellee at 11, *Ridl* (Civ. No. 960032). The communication was then forwarded to the offices of Enserch Exploration, Incorporated [hereinafter Enserch] which was at another address in the same city. *Id.* Enserch's Division Order Department received it on June 2, 1995. *Id.* The correspondence was then routed to Enserch's Lease Administration Department on approximately June 14, 1995. *Id.* Next, it was forwarded to Enserch's Mid-Continent Exploration Region, which received the mailing on June 14, 1995. *Id.* That same day, the correspondence was given to Enserch's Land Development Group. *Id.* Finally, it was routed to Enserch's Legal Department and received on June 15, 1995. *Id.*

19. *Ridl*, 553 N.W.2d at 786.

20. *Id.* The Satisfaction of Oil and Gas Lease was recorded June 15, 1995. *Id.* The Satisfaction indicated that the lease, with the exclusion of the Dickinson Unit portion, had been forfeited. *Id.*

21. *Id.*

22. *Id.* These notices were not within the 20 day statutory period and thus could not be recorded. *See* Brief of Appellant at 6, *Ridl* (Civ. No. 960032).

23. *Ridl*, 553 N.W.2d at 786.

24. *Id.* The suit was commenced by a complaint dated August 8, 1995. Brief of Appellant at 6, *Ridl* (Cir. No. 960032).

motions for summary judgment.[25] EP's motion for summary judgment was granted.[26] Additionally, the district court upheld EP's lease and dissolved the satisfaction of the lease that had been recorded at the Stark County Register of Deeds.[27] The Ridls appealed from the district court's judgment.[28] In a four-to-one decision, the North Dakota Supreme Court *held* that EP's interest in the lease was not terminated when it neglected to reply within twenty days of the Ridls' notice of termination. The court also determined that termination of a lease requires a suitable demand and a failure to further develop within a reasonable time.[29]

II. LEGAL BACKGROUND

In April of 1951, oil was discovered in Williams County, North Dakota.[30] Two years prior to this discovery, the North Dakota Supreme Court decided a forfeiture case that foreshadowed Section 47-16-36 of the North Dakota Century Code.[31] In this pre-statute case, the court noted that the breach of an implied covenant by a lessee could be grounds for a lessor to apply to a court of equity for forfeiture of the lease in question.[32] However, the court cautioned that just because a lease can be forfeited due to the breach of an implied covenant, lessors should not "arbitrarily treat the lease as terminated" before providing the lessee with notice of the breach and "without taking legal proceed-

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25. *Id.* EP counterclaimed for damages resulting from slander of title. Appendix of Appellee at 8, *Ridl* (Civ. No. 960032). Also, in its counterclaim, EP demanded that its title be quieted. Brief of Appellee at 11, *Ridl* (Civ. No. 960032). In addition, EP demanded attorney's fees, costs, and disbursements incurred due to the Ridls' claim. *Id.*

26. *Ridl*, 553 N.W.2d at 786.

27. *Id.* at 786-87. The district court also stated that there had been no issue present as to the 1969 lease in that suit. *Id.* at 787.

28. Brief of Appellants at 3, *Ridl* (Civ. No. 960032).

29. *Ridl*, 553 N.W.2d at 785-86. The final issue alleged by the Ridls, whether the 1973 lease required production in paying quantities, was not decided by the court. *Id.* Since the court upheld summary judgment for EP, the issue was not relevant to this case. *Id.*

30. 2 ANDERSON, *supra* note 7, at 29.

31. Herman Hanson Oil Syndicate v. Bentz, 40 N.W.2d 304, 307-08 (N.D. 1949).

32. *Id.* at 308. *Herman Hanson Oil Syndicate* was the first case in which the North Dakota Supreme Court recognized the existence of implied covenants in an oil and gas lease. *Id.* An implied covenant is a duty stemming from the intent of the parties, which is placed on the lessee by courts. HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 512 (9th ed. 1994). An implied covenant in an oil and gas lease "aris[es] by implication from the lease" and confers obligations on the lessee in addition to the lessee's express duties under the lease. ANDERSON, *supra* note 7, at 29. The following are implied covenants that have been recognized by various jurisdictions: The offset well covenant, the covenant to test, the reasonable development covenant, the further exploration covenant, the marketing and production covenant, and the careful operations covenant. *Id.*

ings to effect such termination."[33] In addition to the notice requirement, the court held that before cancellation will be granted, the lessor must have made a proper demand upon the lessee and given the lessee a reasonable amount of time to comply with the covenant.[34]

Section 47-16-36 of the North Dakota Century Code was enacted by the Legislature in 1951, and seems to contradict the idea that a breach of an implied covenant is determined by the court.[35] In its current form,

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33. Herman Hanson Oil Syndicate, 40 N.W.2d at 308. The *Herman* court reasoned that implied covenants should be acknowledged since they are necessary to advance the primary goal of the lease, which is to encourage the lessee to diligently pursue drilling operations. *Id.* The court further reasoned that without implying covenants, lessors would be helpless against lessees who fail to diligently develop the leased premises. *Id.* at 309. However, a lessor can protect himself by inserting express clauses into the lease. *Id.* at 307.

34. *Id.* at 308-09. The court stated that a court of equity can cancel a lease due to the lessee's failure to proceed with drilling operations with "reasonable diligence" where it appears that forfeiture would be equitable under the facts of the case. *Id.* at 308; *see* Feland v. Placid Oil Co., 171 N.W.2d 829, 835 (N.D. 1969) (affirming the rule that a lessor must demand that the lessee fulfill the obligations of the covenant before a cancellation of a lease because of a breach of the implied covenant to develop).

35. S.B. 85, 32d Leg., (N.D. 1951). The following is the text of Section 47-16-36 in its present form:

> 47-16-36. Duty of lessee to have terminated or forfeited lease released—Publication notice—Satisfaction of lease to be recorded—Notice to real property owner—Remedies. When any oil, gas, or other mineral lease heretofore or hereafter given on real property situated in any county of North Dakota and recorded therein shall terminate or become forfeited, it shall be the duty of the lessee, his successors or assigns, within fifteen days after the date of the termination or forfeiture of any such lease, to have such lease surrendered in writing, such surrender to be signed by the party making the same, acknowledged, and placed on record in the county where the leased property is situated without cost to the owner thereof. If the said lessee, his successors or assigns, shall fail or neglect to execute and record such surrender within the time provided for, then the owner of said real property may serve upon said lessee, his successors or assigns of record, in person or by registered or certified mail, at his last known address, or if the post-office address is not shown of record then by publication once a week for three consecutive weeks in a newspaper of general circulation in the county where the real property is situated, a notice in writing in substantially the following form:
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> > To _____: I, the undersigned, owner of the following described land situated in _____ County, North Dakota, to wit: (description of land) upon which a lease dated _____ day of _____ 19__, was given to _____ do hereby elect to notify you that such lease has terminated or become forfeited by breach of the terms thereof, that I hereby declare and do declare the said lease forfeited and void and that, unless you do, within twenty days from this date, notify the register of deeds of said county as provided by law that said lease has not been forfeited, I will file with the said register of deeds a satisfaction of lease as provided by law, and I hereby demand that you execute or have executed a proper surrender of said lease and that you put the same of record in the office of the register of deeds of said county within twenty days from this date.
> > [lines for date and signature omitted]
>
> The owner of said real property may after twenty days from the date of service, registration, or first publication of said notice, file with the register of deeds of the county where

Section 47-16-36 provides that a mineral owner may serve a notice of termination upon the lessee by either registered or certified mail at the lessee's last known address, or by publication.[36] The statute sets forth that the lessee, or its successors or assigns, shall within twenty days file a notice in writing with the register of deeds that the lease has not been forfeited.[37] Under the statute, if the lessee does not meet the twenty day deadline, the lease can be terminated of record.[38]

The North Dakota Supreme Court did not have occasion to interpret Section 47-16-36 of the North Dakota Century Code until 1978.[39] The foundation for this case came from a 1951 Kansas case interpreting a similar law.[40] In *Christiansen v. Virginia Drilling Co.*,[41] the lessor

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> said real property is situated a satisfaction of lease setting forth that the affiant is the owner of said real property, that the lease has terminated or that the lessee, or his successors or assigns, has failed and neglected to comply with the terms of said lease, reciting the facts constituting such failure and that the same has been forfeited and is void, and setting out in said satisfaction of lease a copy of the notice served, as above provided and the manner and time of the service thereof. If the lessee, his successors or assigns, shall within such twenty days after service, give notice in writing to the register of deeds of the county where said real property is located that said lease has not been forfeited and that said lessee, his successors or assigns, still claim that said lease is in full force and effect, then the said satisfaction of lease shall not be recorded but the register of deeds shall notify the owner of the real property of the action of the lessee, his successors or assigns, and the owner of the real property shall be entitled to the remedies now provided by law for the cancellation of such disputed lease. If the lessee, his successors or assigns, shall not notify the register of deeds, as above provided, then the register of deeds shall record said satisfaction of the lease and thereafter the record of the lease shall not be notice to the public of the existence of said lease or any interest therein, or rights thereunder, and said record shall not be received in evidence in any court of the state on behalf of the lessee, his successors or assigns, against the lessor, his successors or assigns.

N.D. CENT. CODE § 47-16-36 (Supp. 1997).

36. *Id.*; *see supra* note 35 for the text of the statute. Section 47-16-36 has been amended many times since its enactment. In 1953, the statute was amended to reduce the time in which the lessee was allotted to respond to a notice of termination. S.B. 91, 33rd Leg. (N.D. 1953). The time period in which a lessee was to surrender a forfeited lease changed from 60 days to 15 days. *Id.* In addition, the amendment also reduced the time in which a lessee had to notify the register of deeds after receiving a notice of termination that the lease was still valid by changing the time frame from 30 days to 20 days. *Id.* In 1955, the statute was amended and reenacted, but the actual text was not altered. S.B. 100, 34th Leg. (N.D. 1955). Section 47-16-36 of the North Dakota Century Code was also amended in 1977 to add the provision that a satisfaction of lease could be filed by the lessor if the lessee failed to reply to the notice of termination within 20 days. S.B. 2276, 45th Leg. (N.D. 1977). The term "satisfaction of lease" replaced the word "affidavit" in the text of the statue. *Id.* In addition, the statute was amended in 1981 to alter the provision for notice of termination by publication. S.B. 2226, 47th Leg. (N.D. 1981). The interval of publication ("once a week") was added to the rule. *Id.*

37. N.D. CENT. CODE § 47-16-36 (Supp. 1997).

38. *Id.*

39. Taurus Corp. v. Roman York Equity Pure Trust, 264 N.W.2d 688, 690 (N.D. 1978).

40. *Id.* (citing Christiansen v. Virginia Drilling Co., 226 P.2d 263, 268 (1951)); *see infra* note 52 for a comparison of the two statutes.

41. 226 P.2d 263, 268 (1951).

brought legal action alleging the cancellation of a lease due to the lessee's breach of an implied covenant.[42] The Supreme Court of Kansas held that there cannot be a cancellation for a breach of an implied covenant unless there has been a judicial determination to that effect.[43] The court in *Christiansen* reasoned that the provision that governed the situation was a forfeiture statute and, as such, should be "strictly construed in favor of the person whose property is sought to be forfeited."[44] The *Christiansen* court also noted that the statute was not meant to be used as a way in which a lessor could, at the lessor's discretion, forfeit a portion of the lease or the entire lease due to a violation of an implied covenant.[45]

The dissenting opinion in *Christiansen* disagreed with the majority's holding that the only way a breach of an implied covenant is determined by a judicial decision.[46] The dissenting opinion argued that the statute was designed to provide an inexpensive tool for lessors to clear a cloud on their title against a lease believed to be forfeited.[47] Under the dissent's interpretation, the statute should result in an automatic forfeiture of a lessee's interest in a lease regardless of whether the validity of the lease is in dispute.[48] The dissent reasoned that forfeiture under the statute is not automatic because the lessor must strictly adhere to the guidelines set forth in the statute.[49] The dissent further declared that, after the statutory procedure has been followed, the lessee may seek a judicial determination to see whether the lease actually has been forfeited.[50]

In 1978, the North Dakota Supreme Court had its first opportunity to interpret Section 47-16-36 in the case of *Taurus Corp. v. Roman York Equity Pure Trust.*[51] In *Taurus*, a lessor instituted forfeiture proceedings under Section 47-16-36 of the North Dakota Century Code because the lessee had allegedly neglected to pay consideration on the lease.[52] The

42. Christiansen v. Virginia Drilling Co., 226 P.2d 263, 268 (1951).
43. *Id.*
44. *Id.* (citing and interpreting KAN. STAT. ANN. § 55-201 (1994)). The property that was "sought to be forfeited" in this case was the lessee's interest in the lease. *Christiansen*, 226 P.2d at 268.
45. *Id.* (interpreting what is now KAN. STAT. ANN. § 55-201).
46. *Id.* at 269 (Wedell, J., dissenting).
47. *Id.*
48. *Id.* at 269-70.
49. *Id.* at 269.
50. *Id.*
51. 264 N.W.2d 688, 690 (N.D. 1978).
52. Taurus Corp. v. Roman Equity Pure Trust, 264 N.W.2d 688, 690 (N.D. 1978). The statute at issue in *Christiansen* was identical to the version of Section 47-16-36 that was involved in *Taurus*, with

Taurus court declined to adopt the majority's opinion in *Christiansen* and instead adopted the reasoning of the dissent, holding that the statute provides a method by which recorded oil, gas, and other mineral leases could be removed by the lessor.[53] The court further held that a lessee loses interest in a lease if the lessee neglects to reply to a notice of termination within the twenty day statutory period.[54] The court stated that if a lessee contests the termination or forfeiture under Section 47-16-36, the lessee can require the lessor to obtain a judicial determination of the matter by presenting notice to the register of deeds within the required time.[55] However, the *Taurus* court stated that a trial court need not examine the purpose of the termination.[56]

The impact of *Taurus* became evident in the 1983 case of *Nygaard v. Robinson*.[57] In *Nygaard,* the lessor sought forfeiture of an oil and gas

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the exception of a few provisions. First, the North Dakota statute states that the lessee has 15 days in which to release a lease that has become forfeited before a lessor can utilize the procedure set forth in the statute. N.D. CENT. CODE § 47-16-36 (Supp. 1997). The Kansas statute, on the other hand, gives the lessee 60 days to surrender the lease before the statutory procedure can be implemented by the lessor. KAN. STAT. ANN. § 55-201 (1994). Also, North Dakota's statute provides that a satisfaction of lease can be filed when the lessee fails to reply to a notice of termination within the statutory time frame. N.D. CENT. CODE § 47-16-36. The Kansas statute, however, states that an "affidavit of forfeiture" can be filed by the lessor when the lessee neglects to respond within the statutory time period. KAN. STAT. ANN. § 55-201. Additionally, the North Dakota statute does not provide the lessee as much time as the Kansas statute, in which the lessee has to respond to a notice of termination. N.D. CENT. CODE § 47-16-36; KAN. STAT. ANN. § 55-201. The North Dakota statute specifies that a lessee is allowed 20 days to respond to a notice of termination before a lessor is permitted to record a satisfaction of lease, while the Kansas statute entitles a lessee to 30 days in which to reply to a notice of termination prior to the recording of an affidavit of forfeiture. N.D. CENT. CODE § 47-16-36; KAN. STAT. ANN. § 55-201.

53. *Taurus Corp.*, 264 N.W.2d at 688, 692-93 (citing *Christiansen*, 226 P.2d at 268-69). The *Taurus* court stated that it could distinguish this case from *Christiansen* because of the differences in the statutes involved and because *Taurus* was not dealing with a breach of the implied covenant to develop. *Id.* (citing *Christiansen*, 226 P.2d at 268-69). Nonetheless, the *Taurus* court said that it was "unnecessary . . . to distinguish the case before [it] from *Christiansen*" because it "[found] the reasoning of the dissenting judges more convincing than that of the majority." *Id.*

54. *Id.* at 692-93. *But cf. Christiansen,* 226 P.2d at 268 (interpreting what is now KAN. STAT. ANN. § 55-201 (1994)). Furthermore, the *Taurus* court impliedly rejected the long-standing rule that a lease cannot be terminated unless there has been notice and a judicial determination to that effect. *See Taurus Corp.*, 264 N.W.2d at 693; Herman Hanson Oil Syndicate v. Bentz, 40 N.W.2d 304, 308 (N.D. 1949).

55. *Taurus Corp.*, 264 N.W.2d at 693. The notice presented to the register of deeds must be in writing and must state that the lease has not been forfeited but continues to be in "full force and effect." N.D. CENT. CODE § 47-16-36 (Supp. 1997). If no such notice is received by the register of deeds within 20 days, the lessor can record a satisfaction of lease stating that the lease has been forfeited. *Id.*

56. *Taurus Corp.*, 264 N.W.2d at 690. The concurring opinion stated that the statute produces injustice because it establishes a "trap for the unwary." *Id.* at 693 (Pederson, J., concurring). Nevertheless, the concurring justice felt that it was the task of the Legislature to cure this situation instead of the courts. *Id.*

57. 341 N.W.2d 349, 358 n.2 (N.D. 1983).

lease due to a failure of consideration.[58] The North Dakota Supreme Court followed *Taurus* and held that Section 47-16-36 detailed a process by which a lessor could cancel a lease without a judicial determination.[59]

Three years later in *Johnson v. Hamill*,[60] lessors sought to cancel a lease for expiration of its primary term by following the procedure set forth in Section 47-16-36.[61] The lessors in this case were seeking a judicial declaration to cancel the lease on the grounds that the lessee had breached the implied covenant of reasonable development, the implied covenant of exploration, or both.[62] The North Dakota Supreme Court

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58. Nygaard v. Robinson, 341 N.W.2d 349, 353 (N.D. 1983). The lessee in this case, in addition to disputing the cancellation of the lease, challenged the counterpart of § 47-16-36, which provides that a lessor may recover costs and attorney's fees incurred in seeking a judicial termination of a lease. *Id.* at 357-58. The lessee argued that § 47-16-37 of the North Dakota Century Code was unconstitutional under the Equal Protection Clause because it allowed recovery of costs and attorneys fees to lessors bringing an action under § 47-16-36, but not to lessees. *Id.* at 357. The *Nygaard* court held that the statute did not violate either the North Dakota Constitution or the United States Constitution because, although the statute did create a classification, the classification "is not arbitrary." *Id.* at 360. In upholding the statute, the court also stated that there appeared to be plausible reasons why the Legislature would choose to favor the lessor. *Id.* at 359. After considering the "simple procedure outlined in [s]ection 47-16-36 for clearing land titles," the court reasoned that the Legislature enacted § 47-16-37 as a "motivation for a lessee to release a lease on lands containing oil, gas, or other minerals." *Id.* Additionally, the court pointed out that the Legislature might have enacted § 47-16-37 to "equalize the bargaining power of lessors and lessees." *Id.*

59. *Id.* at 351; *see also* Nantt v. Puckett Energy Co., 382 N.W.2d 655, 658 (N.D. 1986) (interpreting North Dakota Century Code § 47-16-36 in keeping with *Taurus*); (Norman Jessen & Assoc. v. Amoco Prod. Co., 305 N.W.2d 648, 649-50 (N.D. 1981)) (adjudicating the validity of a lease, due to an action by the lessor for cancellation of the lease, necessitated by lessee's response within the statutory time limit to the lessor's notice of termination).

60. 392 N.W.2d 55 (N.D. 1986).

61. Johnson v. Hamill, 392 N.W.2d 55, 56 (N.D. 1986). In the alternative, the lessors sought an order requiring the lessee to drill a well on the leased premises. *Id.*

62. *Id.* In 1969, the North Dakota Supreme Court specifically recognized the existence of the implied covenant of reasonable development in the case of *Feland v. Placid Oil Company*, 171 N.W.2d 829, 835 (N.D. 1969). The implied covenant of reasonable development is the duty of the lessee to reasonably develop the land after the drilling of an initial well. ANDERSON, *supra* note 7, at 29. The aim of the covenant of reasonable development is to ensure that all of the recoverable oil and gas underlying the leased land is obtained and that a reasonable amount of production is maintained. PHILLIP G. DUFFORD ET AL., OIL AND GAS FOR THE LANDOWNERS LAWYER 87 (1979). Furthermore, the *Feland* court expounded upon the idea of implied covenants by introducing a test to ascertain whether a lessee has breached an implied covenant. 171 N.W.2d at 835. Specifically, the court held that a lessee has an implied duty to act as a reasonable and prudent operator in the operation and development of the leased land in the absence of an express clause excusing the lessee from doing so. *Id.*

To determine whether a lessee has met the "prudent operator" standard, the court reasoned that the totality of the circumstances surrounding the alleged breach must be considered. *Id.* In 1984, the court attempted to refine the prudent operator standard. *See* Olson v. Schwartz, 345 N.W.2d 33, 39-40 (N.D. 1984). The court began its analysis by reiterating that each case must be adjudged based on its particular facts. *Id.* at 39. Next, the court claimed that it was not possible to devise a standard formula to decide whether a lessee has sufficiently met the "prudent operator" standard. Nevertheless, the court enumerated some factors to be examined. *Id.* at 39-40. Some of the factors the court suggested to use in the prudent operator analysis are: 1) investigating the quantity of oil and gas that could be produced as shown by prior exploration and development; 2) studying market

measured the lessee's actions by the "prudent operator" standard to conclude that the lessee had not breached either of the implied covenants.[63] Consequently, the court held that the lease was still valid.[64]

Thus, prior to *Ridl*, Section 47-16-36 had been interpreted by the court to produce automatic forfeiture, without the need for judicial determination, of a lessee's interest in a lease when a lessee does not respond to a notice of termination within twenty days.[65] However, the court had

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conditions; 3) inspecting the nature of the current operations on nearby tracts; 4) analyzing the natural reservoir; 5) calculating the costs associated with drilling and transportation; and 6) examining the current market situation. *Id.* (citing Sanders v. Birmingham, 522 P.2d 959, 966 (Kan. 1974)). The court also looked at whether a different operator would like to drill on the land. *Id.* at 40 (citing Berry v. Wondra, 246 P.2d 282, 289 (Kan. 1952)). Further, the court stated that the willingness of the operator to develop the premises should be taken into consideration. *Id.* (citing McMahan v. Boggess, 302 S.W.2d 592, 594 (Ky. 1957)). Finally, the court pointed out that the time that has passed since drilling operations last took place should be examined. *Id.* (citing Texas Consol. Oils v. Vann, 258 P.2d 679, 680 (Okla. 1953)).

The *Olson* court also acknowledged and possibly adopted another implied covenant, the covenant of further exploration. 5 HOWARD R. WILLIAMS ET AL., WILLIAMS & MEYERS OIL AND GAS LAW § 845, at 334 (1996). The covenant of further exploration requires the lessor to explore undeveloped portions of leased land. WILLIAMS & MEYERS, *supra* note 32, at 513. Even though the court used the term "implied covenant of reasonable development," it appeared to be speaking in terms of the covenant of further exploration because the lessors brought suit against the lessee for failure to develop the unexplored parts of their land. *Olson*, 345 N.W.2d at 39. The covenant of further exploration resembles the covenant of reasonable development because it also brings about a duty upon the lessee after initial development has occurred. Robert L. Ver Schure, *Another Look at the Implied Covenants*, TWENTY-SIXTH ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE 902 (1980). In contrast, the covenant of reasonable development mandates that a lessor develop previously discovered mineral deposits. Dufford, *supra*, at 88. Although it appeared that the court in *Olson* was impliedly recognizing the covenant of further exploration, its existence in North Dakota was still uncertain. *Olson*, 345 N.W.2d at 39.

In *Johnson v. Hamill*, the court once again used the concepts of "development" and "exploration" interchangeably. 392 N.W.2d 55, 57 (N.D. 1986). The court did note that there is a covenant of exploration but concluded that the facts of the case "deem[ed] it unnecessary to determine whether or not [it] should adopt a separate covenant of further exploration." *Id.* at 57 n.1. In a minority of jurisdictions including Texas, courts have found that the covenant of further exploration is not a separate covenant but is instead part of the implied covenant of reasonable development. Clifton v. Koontz, 325 S.W.2d 684, 696 (Tex. 1959); *see also* Sun Exploration & Prod. Co. v. Jackson, 783 S.W.2d 202, 204 (Tex. 1989) (reaffirming the rule that an implied covenant to explore does not exist independent of the covenant of reasonable development).

63. *Johnson*, 392 N.W.2d at 61.

64. *Id.*

65. *Taurus Corp.*, 264 N.W.2d at 692-93; *see also* Letter from Michael J. Maus, Attorney at *Howe, Hardy, Galloway & Maus, Inc.*, Dickinson, N.D. (Oct. 17, 1997) (on file with author) (stating that Section 47-16-36 "had been used for many years to remove from the record oil and gas leases without a judicial determination"). Accordingly, before *Ridl*, the breach of an implied covenant of reasonable development could result in termination of a lease. Herman Hanson Oil Syndicate v. Bentz, 40 N.W.2d 304, 307-08 (N.D. 1949). However, this remedy was only available to a lessor who had given the lessee satisfactory notice of the breach, demanded that the covenant be complied with, and granted a reasonable time for compliance to the lessee. *Id.* If the validity of the lease was adjudicated, the "prudent operator" standard was utilized to decide whether the lessee has complied with the covenant. *Feland*, 171 N.W.2d at 835.

In 1990, the court again dealt with the implied covenant of reasonable development in *Slaaten v. Amerada Hess Corporation*. 459 N.W.2d 765, 766 (N.D. 1990). The court used the "prudent

only examined the statute's application in certain contexts.[66] Consequently, there was little information with which to predict how the court would apply the statute to a breach of an implied covenant of reasonable development.

III. ANALYSIS

The *Ridl* majority, in an opinion written by Justice Sandstrom, began by interpreting Section 47-16-36 of the North Dakota Century Code to determine whether EP's interest in the 1973 lease terminated because it neglected to reply within twenty days of the Ridl's notice of termination.[67] The court interpreted Section 47-16-36 to mean that if a lessee fails to notify the Register of Deeds within twenty days that the lease has not been forfeited and the lessee's interest in the lease is not lost. Rather, the lessee merely loses record evidence.[68] Since the court held that a lessee does not lose interest in the lease when it fails to reply to a notice of termination, the court interpreted the statute as not affecting the rights between the lessor and lessee, but only their rights as to third parties.[69]

Arguably, this was a great departure from the *Taurus* court's earlier interpretation of Section 47-16-36, that if a lessee does not respond within the statutory time frame, the lease is automatically terminated and all of the interest a lessee had in the lease is lost.[70] In *Taurus*, the court held that Section 47-16-36 provides a method by which recorded oil, gas and other mineral leases could be terminated by the lessor.[71] The *Taurus* court further held that a lessee loses interest in a lease if the lessee neglects to reply to a notice of termination within twenty days.[72] Even though the *Ridl* decision appears to be a significant deviation from the

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operator" factors set forth in *Olson* to conclude that the lessee had fulfilled the covenant of reasonable development. *Id.* at 769 (citing *Olson*, 345 N.W.2d at 38-40). Though the lessor allegedly breached the "implied covenant of reasonable development and further exploration," the court neglected to address what status, if any, the covenant of further exploration has in North Dakota. *Id.* at 766.

66. *See Taurus Corp.*, 264 N.W.2d at 693.

67. Ridl v. EP Operating Ltd. Partnership, 553 N.W.2d 784, 787 (N.D. 1996). The majority opinion was written by Justice Sandstrom and was joined by Chief Justice VandeWalle and Justices Neumann and Maring. *Id.* at 785, 789.

68. *Id.* at 787. A loss of record evidence means that the lease does not exist on the record. Norman Jessen & Assoc. v. Amoco Prod. Co., 305 N.W.2d 648, 649 (N.D. 1981).

69. *Ridl*, 553 N.W.2d at 787; *see* N.D. CENT. CODE § 47-16-36 (Supp. 1997) (stating that if a lessee does not inform the register of deeds within 20 days that the lease is still valid, the lessee can record a satisfaction of lease, after which the record of the lease will not be notice to the public of the existence of the lease nor can the lease be admitted into a court proceeding by a lessee).

70. *See Taurus Corp.*, 264 N.W.2d at 689.

71. *Id.*

72. *Id.*

holding of *Taurus*, the court did not expressly overrule *Taurus*.[73] Rather, the court stated that it "decline[d] to extend [*Taurus*] to cases involving alleged breaches of implied covenants."[74]

The *Ridl* court's primary reason for departing from the *Taurus* holding stems from the principle that the law despises forfeiture.[75] "[F]orfeiture statutes are to be strictly construed in favor of the person whose property is sought to be forfeited" if the statute is vague or ambiguous.[76] Based on this premise, the court reasoned that Section 47-16-36 was not meant to create a trap for unguarded lessees whose property interests could be automatically forfeited.[77] Thus, the court construed Section 47-16-36 simply as a guideline that should be followed by the lessor before the validity of a lease is adjudicated.[78]

Another reason the *Ridl* court stated for rejecting *Taurus* was to avoid rendering Section 47-16-37 of the North Dakota Century Code superfluous.[79] Section 47-16-37 provides the lessor with the right to

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73. *Ridl*, 553 N.W.2d at 787-88. *Ridl* was also a shift from the *Taurus* court's interpretation that the statute did concern the rights between the lessor and lessee. *Taurus Corp.*, 264 N.W.2d at 689 (holding that a lessee's interest in a lease is lost if the lessee does not answer a notice of termination within 20 days).

74. *Ridl*, 553 N.W.2d at 788; *see* Brief of Appellee at 26-27, *Ridl* (Civ. No. 960032) (claiming that *Taurus* was correctly decided but distinguishing it from *Ridl* because *Taurus* involved lack of consideration and not a breach of an implied covenant).

75. *Ridl*, 553 N.W.2d at 788 (citing Johnson v. Gray, 265 N.W.2d 861, 864 (N.D. 1978)).

76. *Id.* (citing Nelson v. TMH, Inc., 292 N.W.2d 580, 584 (N.D. 1980)) (stating that "equity abhors forfeiture"); *see also* Brief of Appellee at 35-36, *Ridl* (No. 960032) (discussing that strict application of the statute to the lease in question is unconstitutional since it provided the lessee with only six to eight days to answer the notice of termination after allowing for mailing, thus depriving the lessee of due process of law). In *Taurus*, the court held that § 47-16-36 is constitutional, even though the statute does not afford the lessee extra days to respond to a notice served by mail, because due process does not require that the lessee have 20 days after being served in which to respond. 264 N.W.2d at 692. Even so, the court expressly noted that it was not holding that there could never be an unconstitutional application of the statute. *Id. But see* Brief of Appellant at 9, *Ridl* (Civ. No. 960032) (arguing that the statute is constitutional as applied in *Ridl* because of the court's decision in *Taurus*).

77. *Ridl*, 553 N.W.2d at 787-88. EP argued that North Dakota Century Code § 47-16-39.1 also supports the idea that the Legislature did not intend for oil and gas statutes to result in automatic forfeiture. Brief of Appellee at 25, *Ridl* (Civ. No. 960032). Section 47-16-39.1 states that payments of royalties are the core of a lease, and a lessee's breach of the obligation to pay royalties "may" be grounds for cancellation of the lease. N.D. CENT. CODE § 47-16-39.1 (1987 & Supp. 1997). Nevertheless, the statute mandates that even when a lessee fails to make royalty payments, cancellation of the lease can only be made by the judiciary. Brief of Appellee at 25, *Ridl* (Civ. No. 960032).

78. *Ridl*, 553 N.W.2d at 787. The court held that loss of record evidence is "[t]he only consequence" provided by Section 47-16-36 when a lessee fails to respond within the statutory time limit; automatic forfeiture is not included in the statute as a result for failing to respond in a timely manner. *Id.*

79. *Id.* The following is the text of Section 47-16-37:

> 47-16-37. Action to obtain release—Damages, costs, and attorney's fees—Attachment.—Should the owner of such lease neglect or refuse to execute a release, then the

acquire a lessee's interest by bringing legal action when a lessee fails to execute a release.[80] The court reasoned that interpreting Section 47-16-36 to mean that a lease would be automatically terminated upon a lessee's failure to respond within the twenty day time limit would make the procedure outlined in Section 47-16-37 useless.[81] Thus, the court decided that Section 47-16-36 must be construed as establishing a preliminary method by which a lessor can institute forfeiture proceedings; with Section 47-16-37 giving the lessor the right to sue the lessee for release upon failure of the lessee to execute the release and to recover the costs incurred in doing so.[82]

Overall, the *Ridl* court appeared to balance two principles in interpreting Section 47-16-36.[83] First, the court recognized that the statute serves as a form of protection for landowners.[84] Second, the court sought to protect lessees by examining whether forfeiture would be too harsh a result for noncompliance with the statute.[85] Ultimately, the

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> owner of the leased premises may sue in any court of competent jurisdiction to obtain such release, and he may also recover in such action of the lessee, his successors or assigns, the sum of one hundred dollars as damages, and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and he may also recover any additional damages that the evidence in the case will warrant. In all such actions, writs of attachment may issue as in all other cases.

N.D. CENT. CODE § 47-16-37 (Supp. 1997).

80. *Id.*

81. *Ridl*, 553 N.W.2d at 787. The court stated that a statute must be interpreted to acknowledge all of its terms "so that no part of the statute is inoperative or superfluous." *Id.* (quoting Trinity Med. Ctr., Inc. v. Holum, 544 N.W.2d 148, 157 (N.D. 1996)). The court reasoned that a statute must be read to have a purpose "because the law neither does nor requires idle acts." *Id.* (quoting State *ex rel.* Kusler v. Sinner, 491 N.W.2d 382, 385 (N.D. 1992)).

82. *Id.* (citing N.D. CENT. CODE §§ 47-16-36 to -37 (Supp. 1997)); *see supra* note 58 (discussing that the court in *Nygaard* held that Section 47-16-36 set forth an uncomplicated process to be followed for clearing a title and that Section 47-16-37 served as an incentive for a lessee to release a lease when its validity is challenged).

83. *Ridl*, 553 N.W.2d at 787-88.

84. *Id.* The Ridls were only receiving $1.00 each per month in royalties from the leased lands; this royalty was from the production of the Dickinson Unit. Brief of Appellant at 8, *Ridl* (Civ. No. 960032). This situation can be prevented by the insertion of a "Pugh clause" in a lease. *See* Olson v. Schwartz, 345 N.W.2d 33, 41 n.3 (N.D. 1984). A Pugh clause usually contains the following language:

> this lease shall terminate at the end of the primary term as to all of the leased land except those within a production or spacing unit . . . on which is located a well producing or capable of producing oil and gas or on which lessee is engaged in drilling or reworking operations.

Id. Further, Section 38-08-09.8 of the North Dakota Century Code provides that leased land outside of a unit can be considered to be held by production resulting from the unit for only two years after part of the land has been unitized. N.D. CENT. CODE § 38-08-09.8 (1987 & Supp. 1997). However, the Ridls did not have a Pugh clause in their lease. Brief of Appellee at 24, *Ridl* (No. 960032). Additionally, Section 38-08-09.8 of the North Dakota Century Code was passed after the Ridls had executed their lease with EP's predecessor. *Id.*

85. *Ridl*, 553 N.W.2d at 787-88.

court's abhorrence of forfeiture proved to be the stronger interest for its interpretation of Section 47-16-36.[86] Consequently, the court interpreted the statute to be only a guideline for a lessor to follow, not a method a lessor could use to automatically forfeit a lease.[87]

In addition to interpreting Section 47-16-36, the *Ridl* court reaffirmed the rule that before forfeiture for a breach of the implied covenant of reasonable development will be granted, the lessor must first give notice of the breach and demand that those terms be met within a reasonable amount of time.[88] In this case, the court ruled that the Ridls had not given proper notice or demand to EP.[89]

The Ridls asserted several instances in which they claimed they had given EP proper notice of its breach of the covenant of reasonable development and demanded that EP comply with the covenant.[90] First, the Ridls argued that a demand for further development was made by R. E. Moore's letter of 1976 in which he asked EP either to drill on the leased land or release it.[91] However, the court reasoned that this demand was

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86. *Id.* The court reasoned that its decision still protects the lessor since a lessor is still able to sue to obtain a release of lands that are not being produced. *Id.* at 787.

87. *Id.*

88. *Id.* at 789. The court stated that proper notice and demand is necessary to encourage parties to develop the premises. *Id.* at 788. In addition to reiterating the demand and reasonable time for compliance requirements, the court reaffirmed that the issue of whether there has been reasonable development is determined by the "prudent operator" standard. *Id.*; *see* Johnson v. Hamill, 392 N.W.2d 55, 58 (N.D. 1986); Olson v. Schwartz, 345 N.W.2d 33, 39 (N.D. 1984). The court explained that the "prudent operator" standard is to be used after a lessor has given the lessee notice of the alleged breach and made a satisfactory demand for compliance upon the lessee, and the lessee has not complied with the demand within a reasonable time. *Ridl*, 553 N.W.2d at 788 (citing *Olson*, 345 N.W.2d at 40). The lessor must then bring judicial action against the lessee, wherein the lessee's actions will be judged by the "prudent operator" standard to decide whether the lessee has breached the implied covenant. *Id.* (citing *Johnson*, 392 N.W.2d at 58). Since the Ridls had not made a proper demand for compliance upon EP, the court did not examine EP's actions associated with the implied covenant of reasonable development to see if these actions measured up to the "prudent operator" standard. *Id.*

89. *Id.* at 788-89. Furthermore, the court noted that the Ridls had not conformed to the specific notice clause set forth in their lease. *Id.* at 789. This clause provided that the Ridls were required to notify EP in writing of a breach of an express or implied obligation. *Id.* The notice was to serve as a condition precedent to a lawsuit by the Ridls against EP. *Id.* The notice clause in the lease stated the following:

> '[i]n the event Lessor considers that Lessee has failed to comply with any obligation hereunder, express or implied, Lessor shall notify Lessee in writing specifying in what respects Lessor claims Lessee has breached this lease. The service of such notice and lapse of sixty days without Lessee's meeting or commencing to meet the alleged breaches shall be a condition precedent to any action by Lessor for any cause.'

Id. at 789 n.6. As such, the court concluded that the Ridls had failed to make an appropriate demand to EP for compliance with the covenant of reasonable development. *Id.* at 789.

90. *Id.*

91. *Id.* at 788.

met when EP's predecessor drilled a well on the leased land in 1981.[92] Thus, the court held that this letter could not qualify as sufficient notice as to the breach of the implied covenant of reasonable development that the Ridls were alleging in the current case.[93]

Second, the Ridls argued that notice and implied demand was given by their attorney's May 25, 1995 letter to EP soliciting release of the lease, which was accompanied by a notice of termination.[94] Since EP received the notice of termination at the same instance as the demand, the court reasoned that EP could not have reasonably been expected to have subsequently developed the property.[95] Therefore, the court ruled that the letter from the Ridls' attorney did not qualify as a sufficient demand to comply with the covenant of reasonable development.[96] Third, the Ridls asserted that their complaint qualified as a demand for compliance with the covenant of reasonable development.[97] However, the court reasoned that a lessor could not reasonably expect a lessee to develop the leased land after legal action has been instituted against the lessee.[98] Thus, the court said that the demand requirement was not met by the Ridls' complaint.[99] For these reasons, the court held that the Ridls failed to give requisite notice and demand to EP.[100]

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92. *Id.* Further, the court reasoned that when the Ridls ratified the 1973 lease, any consequence of Moore's letter would have ended. *Id.* The trial court determined that Moore's letter was immaterial after the 1973 lease was ratified and adopted in 1981. Appendix of Appellee at 75-76, *Ridl* (No. 960032).

93. *Ridl*, 553 N.W.2d at 788.

94. *Id.*; *see* Brief of Appellant at 15, *Ridl* (No. 960032). *But see* Brief of Appellee at 18, *Ridl* (No. 960032) (arguing that Ridls' correspondence constituted a demand for a release, not a demand for development).

95. *Ridl*, 553 N.W.2d at 788. Additionally, the court found that the letter impliedly cautioned against further development of the leased premises. *Id.*

96. *Id.*

97. *Ridl*, 553 N.W.2d at 788.

98. *Id.* at 788-89. As with the Ridls' attorney's letter, the court stated that the complaint impliedly cautioned EP against further development of the leased premises. *Id.* at 788.

99. *Id.* at 788.

100. *Id.* at 789. Alternatively, *Ridl* did not solve the mystery of whether North Dakota recognizes the implied covenant of further development. *See id.* at 786-89. The case did not have an impact on clarifying the distinction between the covenant of reasonable development as an independent covenant, separate and distinct from the implied covenant of reasonable development, whether further exploration is simply a component merged into the implied covenant of reasonable development, or whether the implied covenant of further exploration is to be recognized at all. *Id.* at 786, 788; *see also* 5 WILLIAMS, *supra* note 62, § 845, at 334. If anything, *Ridl* serves to further confuse the two covenants since the court used the phrases "further develop" and "reasonable development" interchangeably. *Ridl*, 553 N.W.2d at 786, 788.

Justice Meschke respectfully dissented from the majority, whose opinion he referred to as a "gutting of [Section 47-16-36]."[101] Asserting that the majority's decision robbed lessors of "an important tool that encourages development," Justice Meschke compared the damaging effect of the majority's decision to "sarcopenia," the affliction by which aging persons lose skeletal muscle.[102] Justice Meschke argued that this decision is a "form of legal sarcopenia—a loss of legal muscle for mineral owners in the oil fields."[103]

Quoting the court's decision in *Taurus,* Justice Meschke argued that Section 47-16-36 North Dakota Century Code was meant to establish an uncomplicated way in which property owners could clear their titles without going to court.[104] Justice Meschke claimed that the majority was ignoring the "plain direction" of the statute by affirming the district court's interpretation of Section 47-16-36.[105] Justice Meschke reasoned that the majority's interpretation, that forfeiture does not automatically result from a lessee's failure to timely respond, rendered Section 47-36-36 useless.[106]

In addition, Justice Meschke argued that *Taurus*, which provided for automatic forfeiture after the twenty day waiting period, should be followed because this was the standard way in which lessors and lessees in the oil and gas industry conduct business with each other.[107] Justice Meschke claimed that, because the majority declined to follow *Taurus*, the *Ridl* opinion "makes a critical and drastic change in a well-established relationship between oil and gas lessors in this state."[108]

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101. *Id.* at 792 (Meschke, J., dissenting).

102. *Id.* at 789.

103. *Id.* at 789-90; *see also* Reiss v. Rummel, 232 N.W.2d 40, 43 (N.D. 1975) (discussing how the Legislature is concerned with protecting landowners who were "actively solicited" by "shrewd entrepreneurs" to lease their mineral rights).

104. *Ridl*, 553 N.W.2d at 791.

105. *Id.* Justice Meschke also noted that the court should not consider the "wisdom" of Section 47-16-36 since that is a function of the Legislature. *Id.*

106. *Id.* at 790. Justice Meschke pointed out that if a lease is canceled in court, there is no reason to use the statute. *Id.* Consequently, he argued that the statute needs to be interpreted to apply to leases where the forfeiture is in dispute. *Id.*

107. *Id.* (citing Taurus Corp. v. Roman York Equity Pure Trust, 264 N.W.2d 688, 689 (N.D. 1978)).

108. *Id.* To illustrate this point, Justice Meschke discussed an earlier case in which the court had acknowledged the appropriateness of using Section 47-16-36 to cancel a lease. *Id.* (citing Johnson v. Hamill, 392 N.W.2d 55, 56 (N.D. 1986)). In *Johnson*, a case involving an alleged breach of an implied covenant of further development, the lessors sent a Section 47-16-36 notice to the lessee that alleged the lease had terminated. 392 N.W.2d at 56. The lessee replied in conformity with the statute so the lessor was then required to commence legal action in order to have the lease terminated. *Id.* Justice Meschke emphasized the fact that the court's decision in that case was in favor of the lessee.

While the majority claimed that the statute resulted in an automatic forfeiture of the lease, Justice Meschke argued that forfeiture is not automatic because a judicial determination can be made if the lessee disputes the termination of the lease by notifying the Register of Deeds within the statutory time period.[109]

Justice Meschke reiterated the idea from *Taurus* that if the statute resulted in automatic forfeiture, there would still be a remedy to protect against "unconscionable results."[110] He pointed out that there is another statute, Section 32-17-13 of the North Dakota Century Code, which allows a party against whom default has been rendered to present his or her case when such an action appears equitable.[111] Justice Meschke further noted that Section 47-16-36 does not contain any restrictive language to indicate that it specifically applies to undisputed forfeitures, and as such, it should be read to apply when the lease has terminated for any reason.[112]

IV. IMPACT

Ridl marks a "critical and drastic change in a well-established relationship between oil and gas lessors and lessees in this state."[113] Relying on *Taurus*, parties in the oil and gas industry in North Dakota have been using the process set forth in Section 47-16-36 to terminate leases based on a lessor's allegation of the lessee's breach of an implied covenant.[114] As Justice Meschke noted, the *Taurus* interpretation of Section 47-16-36 served as a means for lessors to quickly and easily clear a title that was allegedly in dispute.[115]

According to an oil and gas law practitioner, by "refus[ing] to recognize . . . [Section] 47-16-36 in cases where there has been [a] breach of an implied covenant . . . [the court in *Ridl* has] significantly

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Ridl, 553 N.W.2d at 791. Using the rationale of *Johnson*, Justice Meschke stated that the only thing EP would have had to do in order to dispute the cancellation was to simply answer the Ridls' notice within the 20 day time limit. *Id.*

109. *Id.* at 790. Justice Meschke also disagreed with the majority's decision that cancellation of a lease because of breach of the implied covenant to develop can only be obtained by suing the party in court. *Id.* at 791. He argued that going to court is a remedy available for a lessee who disputes that there has been a breach of the covenant. *Id.* at 790.

110. *Id.* (citing *Taurus Corp.*, 264 N.W.2d at 693 (Pederson, J., concurring)).

111. *Id.* (citing N.D. CENT. CODE § 32-17-13 (Supp. 1997)).

112. *Id.* at 791. Justice Meschke noted that Section 47-16-36 states that it pertains to leases where forfeiture is in controversy. *Id.* Thus, Justice Meschke concluded that the statute should apply to a forfeiture issuing from a breach of an implied covenant as in this case. *Id.*

113. *Id.*

114. *Id.* at 787.

115. *Id.*; *see also* Maus, *supra* note 65 (stating that Section 47-16-36 "had been used for many years to remove from the record oil and gas leases without a judicial determination").

shift[ed] to the mineral owner the expensive burden of litigation in cases where [litigation] might not otherwise [be] required."[116] As a result, the practitioner predicted that a larger number of "oil and gas leases [will be] 'warehoused' because the lessor no longer has an inexpensive remedy" for a lessee's failure to develop leased lands.[117]

Despite its departure from *Taurus*, the court in *Ridl* reasoned that it was creating a just way of dealing with terminations of implied covenants because a lessor must now have something more than just a loophole to get a lease canceled.[118] The court recognized the lessee's investment in a lease and managed to protect this by eliminating a potential ambush upon a lessee who may not receive notice within the twenty day limit or may not be able to respond within that time frame.[119] Since the court protected against automatic forfeiture, it appears to intend to bring about more equitable results in the oil and gas industry than had previously occurred in the years prior to *Ridl*.[120]

After *Ridl*, an oil and gas lessor who disputes the validity of his or her lease due to the lessor's breach of an implied covenant must follow several steps.[121] First, the lessor must give the lessee proper notice of termination due to the alleged breach and the facts and circumstances giving rise to this claim.[122] Second, the lessor must also provide the

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116. Maus, *supra* note 65.

117. *Id.*

118. *Ridl*, 553 N.W.2d at 787. *But see* N.D. CENT. CODE § 47-16-37 (Supp. 1997) (providing that a lessor may recover costs and attorney's fees incurred in seeking a release of a lease); *cf.* Maus, *supra* note 65 (reasoning that fewer lessors will dispute lessees who are retaining undeveloped portions of land because of the cost of litigation). .

119. *Ridl*, 553 N.W.2d at 787. EP did not receive notice within the 20 days allotted to it because the Ridls' attorney had sent the notice to the wrong address, causing it to go through many departments before it reached the correct destination. Brief of Appellee at 34, *Ridl* (No. 960032). By the time the correspondence reached the correct destination, the statutory period had expired. *Id.*

120. *Ridl*, 553 N.W.2d at 787-88. *But cf.* Maus, *supra* note 65 (discussing that *Ridl* creates a "strong disincentive to development"). One concern the court did not explicitly address is whether the *Ridl* interpretation will be applied retroactively or prospectively, although it is assumed that it will be applied prospectively. *See generally Ridl*, 553 N.W.2d at 785. Clearly, the question of whether the decision should be applied proactively or retroactively would be of great consequence to mineral owners and oil and gas companies that lease the mineral owners' interests. *See* Malloy v. Boettcher, 334 N.W.2d 8, 8-9 (N.D. 1983). In *Malloy*, the court applied its ruling on a real property deed retroactively. *Id.* As a result, years of deeds with reservations were prepared incorrectly. *Id. But cf.* N.D. CENT. CODE § 1-02-10 (1987) (stating that "[n]o part of this code is retroactive unless it is expressly declared to be so"); Slaaten v. Amerada Hess Corp., 459 N.W.2d 765, 766-67 (N.D. 1990) (citing N.D. CENT. CODE § 38-08-09.8 (1987) (stating that Section 38-08-09.8 of the North Dakota Century Code, amended in 1983, which shortened the length of time in which a lease can be held by production due to unitization, shall not be applied retroactively to a portion of land unitized in the 1960s)).

121. *Ridl*, 553 N.W.2d at 787-88.

122. *Id.* at 788; *see Olson*, 345 N.W.2d at 40.

lessee with a demand that the covenant be complied with.[123] According to the statute, the lessor can include a release for the lessor to sign.[124] If this release is not signed by the lessor, or if the Register of Deeds of the county in which the land is located does not receive a letter stating that the lease is still in effect, the lessor can record a Satisfaction of Oil and Gas Lease.[125] However, the lessee must be given a reasonable amount of time to comply with the demand.[126] If the demand is not complied with within a reasonable amount of time, the lessee can take the lessor to court to get a judicial determination of termination.[127]

Nevertheless, even after *Ridl*, a lessee should not ignore a notice of termination should one be received.[128] *Ridl* only specifically addressed the situation of a breach of an implied covenant of reasonable development and did not discuss how the statute would apply in other fact scenarios, such as in the case of an alleged breach of an express term of a lease.[129] Since this uncertainty exists, a lessee should still file a reply to any notice of termination within the twenty day statutory period, despite the lessor's stated reasons for the notice of termination.[130]

V. CONCLUSION

In *Ridl,* the North Dakota Supreme Court held that a lessee's interest in a lease is not terminated when it neglects to reply within twenty days of a notice of termination due to a breach of an implied covenant; and that termination of a lease requires a suitable demand and

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123. *Ridl,* 553 N.W.2d at 788; *see Olson*, 345 N.W.2d at 39. In order to qualify as an appropriate demand, it must be a clear, not implied, demand that the terms of the covenant be complied with. *Ridl,* 553 N.W.2d at 788-89. This demand cannot be served with a complaint, nor can the lessor assert that a complaint constitutes notice and demand. *Id.* at 788.

124. N.D. CENT. CODE Section 47-16-36 (Supp. 1997).

125. *Id.* However, the lessee's interest would not be terminated at that time. *Ridl,* 553 N.W.2d at 787-88. Instead, only record evidence of the lessee's interest in the lease would be lost. *Id.* at 787.

126. *Id.* at 789.

127. *Id.* at 787-88.

128. *Supreme Court Reverses Prior Holding Regarding Lease Termination Statute*, MINERAL LAW NEWSLETTER, (Fleck, Mather, & Strutz, Ltd., Bismarck, N.D.), Oct. 1996, at 4 [hereinafter *Lease Termination*]; *see also* Letter from John L. Sherman, Attorney at Mackoff, Kellogg, Kirby & Kloster, P.C., Dickinson, N.D. (Oct. 23, 1997) (on file with author) (reasoning that § 47-16-36 is "a prerequisite to commencement of an action to terminate a lease in cases where a dispute exists as to whether or not the lease is valid").

129. *Lease Termination, supra* note 128, at 4. Moreover, it is not certain if *Ridl* would apply in a *Taurus* situation, where there has been a failure of consideration. *Ridl,* 553 N.W.2d at 787. *But cf.* Maus, *supra* note 65 (discussing that *Ridl* has "render[ed] the statute useless").

130. *Lease Termination, supra* note 128, at 4.

a failure to further develop within a reasonable time.[131] In order to clear up the uncertainty left after *Ridl*, the court or the Legislature should clarify the specific situations to which this holding applies. If the court intends for Section 47-16-36 to be used to produce automatic forfeiture for breaches of express obligations of a lease, this should be declared so that lessors and lessees alike will know their rights and duties under the law.[132]

Leah Kelley Kopseng[133]

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131. *Ridl*, 553 N.W.2d at 785-86.

132. Additionally, the court or the Legislature should clearly state whether North Dakota recognizes the implied covenant of further exploration. *See supra* notes 62, 100. If North Dakota chooses to recognize this covenant, it should be specified how this covenant differs from the implied covenant of reasonable development so that parties to a lease will be aware of their rights and obligations. *See supra* notes 62, 100.

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